COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

No. 2017-P-0102

HOMEOWNERS REHAB, INC. and MEMORIAL DRIVE HOUSING, INC.,

Plaintiffs, Appellees

v.

RELATED CORPORATE V SPECIAL LIMITED PARTNER, L.P. and CENTERLINE CORPORATE PARTNER V, L.P.

Defendants, Appellants

On Appeal from a Judgment of the Suffolk Superior Court, Civil Action No. 14-3807

BRIEF OF THE APPELLANTS

Dennis E. McKenna, BBO No. 556428
Counsel for the Appellants
RIEMER & BRAUNSTEIN LLP
Three Center Plaza
Boston, Massachusetts 02108
(617) 523-9000
dmckenna@riemerlaw.com

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STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in determining that the Plaintiffs Homeowner's Rehab, Inc. and Memorial Drive Housing, Inc. could force a sale of the subject Property through the exercise of a right of first refusal ("ROFR") contained in the Right of First Refusal and Option Agreement (the "HRI Agreement") in the absence of a bona fide offer to purchase the subject Property, where the option to purchase the Property contained in the HRI Agreement could have been unilaterally exercised, and the Property purchased at fair market value as opposed to a lower price under the ROFR?

2. Whether the Superior Court's consideration of extrinsic evidence when interpreting the unambiguous and fully integrated Partnership Agreement and HRI Agreement was an error of law?

3. Whether the Superior Court erred in ruling that the Plaintiffs' actions were authorized by the written agreements, despite the General Partner's lack of authority to sell the Property, thereby defeating the Defendants' Counterclaim for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing?

4. Whether the Superior Court erred in ruling in favor of Plaintiffs' Motion for Summary Judgment, despite the presence of disputed issues of material fact, and by making favorable inference in favor of the moving party rather than the nonmoving party?

STATEMENT OF THE CASE

1. Procedural History.

This appeal arises out of a civil action brought by Homeowner's Rehab, Inc. ("HRI") and Memorial Drive Housing, Inc. ("Memorial Drive") against Centerline Corporate Partners V L.P. ("Centerline") and Related Corporate V SLP, L.P. ("Related") (Joint Record Appendix ("A") 3-22). The Complaint, filed on December 5, 2014, sought a declaratory judgment about a Right of First Refusal and Option Agreement (the "HRI Agreement") and the Partnership Agreement of Memorial Drive Housing Limited Partnership (the "Partnership"). Under the HRI Agreement, HRI is the holder of a right of first refusal ("ROFR") and an option to purchase ("Option") with respect to the Property. HRI attempted to exercise the ROFR at a time when the Property was not for sale, and the Limited Partners neither desired nor consented to the sale of the Property.

The Limited Partners maintained that if HRI wished to purchase the Property, it could do so at any time under the Option, which required that a fair market value being paid to the Partnership for the Property, a price higher than required by the ROFR. The higher price received would help to offset the substantial resulting tax liabilities to the Limited Partners resulting from a sale.

On January 20, 2015, the Limited Partners answered the Complaint and asserted a Counterclaim against Memorial Drive for having breached its fiduciary duty to the Limited Partners by conspiring with its parent, HRI, to sell it the Property under the ROFR, thereby placing HRI's interests ahead of the interests of the Limited Partners, and by refusing to make the Partnership's books and records available to the Limited Partners upon their request (A. 150-172). The Limited Partners also sought declaratory relief with regard to the obligations of Memorial Drive to the Limited Partners and also claimed that HRI aided and abetted the breach of fiduciary duties and that the Plaintiffs breached the implied covenant of good faith and fair dealing.

On May 10, 2016, the Plaintiffs moved for summary judgment on all claims (A. 290). As part of their opposition, the Limited Partners moved to strike portions of the Affidavit of Peter Daly submitted in support of Plaintiffs' Motion for Summary Judgment (A. 729). On September 14, 2016, the Superior Court allowed the Plaintiffs' Motion for Summary Judgment and issued a Memorandum of Decision and Order on Plaintiffs' Motion for Summary Judgment (the "Decision") (A. 749). Also on September 14, 2016, the Superior Court allowed in part and denied in part the Defendants' Motion to Strike Portions of the Affidavit of Peter Daly and issued a Memorandum of Decision and Order on Defendants' Motion to Strike (A. 770).

On October 11, 2016, Judgment entered in favor of the Plaintiffs on their Complaint and dismissed the Defendants' Counterclaims (A. 772). The Limited Partners filed a Motion for Stay Pending Appeal. On October 21, 2016, the Superior Court entered an Order staying the matter pending an appeal (A. 775). On October 31, 2016, the Defendants filed a Notice of Appeal of the Judgment and all findings and rulings underlying the entry of the Judgment (A. 776).

2. Statement Of The Facts

HRI is the controlling stockholder of Memorial Drive (A. 327). Peter Daly ("Daly") is the Executive Director and the day-to-day decision maker of HRI (A. 312). Daly is also the Executive Director of Memorial Drive (A. 327). When Memorial Drive acted as general partner of the Partnership, HRI made the decisions and then consulted with the Board of Directors of Memorial Drive (A. 327). Daly was the person delegated to execute all of the documents when Memorial Drive acted as the general partner of the Partnership (A. 327).

The Property consists of 211 affordable apartment units, 89 market rate units, some commercial space and a 262-space parking garage (A. 313). The Property is a "qualified low-income housing project" and, therefore, was eligible for financing under the Low Income Housing Tax Credit ("LIHTC") provision of Internal Revenue Code, 26 U.S.C. § 42 ("Section 42") (A 313). LIHTC projects generate tax credits over a ten-year period and are subject to a fifteen year compliance period (A. 313). The initial compliance period for the Property under Section 42 ended on December 31, 2012 (A. 313).

The Partnership is a Massachusetts limited partnership established pursuant to a Limited Partnership Agreement, as Amended and Restated on July 10, 1997 (the "Partnership Agreement") (A. 311). Related is the Partnership's Special Limited Partner ("SLP") (A. 311). Centerline is the Limited Partner of the Partnership (A. 311) (Centerline and Related are "Limited Partners").

On July 10, 1997, the Partnership executed the HRI Agreement (A. 313). Section 3 of the HRI Agreement provides HRI with a ROFR containing three alternative potential purchase prices for which HRI may acquire the Property, with one price being the Restricted Market Value which is related to the Property's fair market value (A. 515). The ROFR allowed HRI to exercise the ROFR at the lowest of the three price options (A. 515). Section 6 of the HRI Agreement contains a separate Option for HRI to purchase the Property, with a single price which was the Restricted Market Value (A. 517).

Daly was aware since December 2013 that the Limited Partners were concerned with their tax obligations should a sale of the Property occur (A. 328). In 2014, the Limited Partners consistently

confirmed to Daly that they did not desire to sell the Property and would not accept an offer from HRI being used to trigger the ROFR (A. 537, 539). The Limited Partners repeatedly communicated that any proposed sale must receive the consent of the SLP and, without that consent, Memorial Drive had no right to attempt to trigger the ROFR, and further confirmed that HRI could exercise the Option without the consent of the Limited Partners, and pay the Restricted Market Price (A. 539, 541).

HRI has never exercised its Option to purchase the Property (A. 329). The Property was not for sale and the Limited Partners never authorized or directed a sale (A. 329). On September 4, 2014, HRI sent a letter from its litigation counsel in which counsel asserted that the ROFR could be triggered by a third party offer and exercised by HRI without obtaining SLP consent (A. 544). On September 24, 2014, the Limited Partners responded that the ROFR was included in this and many other affordable projects to provide a mechanism for tenants and qualified nonprofit organizations to purchase the Property in the event that the Partners agreed to sell the Property, or in the event the Limited Partners exercised their right

to force a sale of the Property under Section 5.4C of the Partnership Agreement. However, the Option was the sole mechanism granted to HRI to purchase the Property without the Limited Partners' consent (A. 548).

On October 1, 2014, in its efforts to purchase the Property by triggering the ROFR, HRI began its communications with Madison Park Development Corporation ("Madison "Park"), whose primary mission is the social, physical, and economic vitalization of the Roxbury section of Boston (A. 332). Daly sent an email to Jeanne Pinado ("Pinado") of Madison Park asking to do him a "favor" to make an offer to purchase the Property (A. 333), in order to "to trigger the right of first refusal" (A. 331, 648). Madison Park has never owned any properties outside of Roxbury, and its real estate development goals did not involve purchasing the Property (A. 332).

Daly informed Pinado that he wanted Madison Park to make an offer on the Property for the sole purpose of triggering a right of first refusal (A. 333, 334, 626-628). Daly repeatedly explained to Pinado "that he was looking for Madison Park to make an offer so that it would trigger the right of first refusal so

his group could purchase the Property." (A. 334, 628). Pinado questioned the legality of Daly's strategy, which she characterized as a strategy used "to get rid of . . . investors." (A. 718).

Before making the offer, Madison Park never visited the Property and Pinado never reported the potential acquisition to the Board of Directors of Madison Park (A. 335, 629, 632). Daly, and not Madison Park, chose which due diligence materials were given to Madison Park (A. 335). Memorial Drive as General Partner provided confidential financial documents of the Partnership to Madison Park in order to obtain an offer to trigger the ROFR (A. 335, 650).

On November 19, 2014, Madison Park made an offer to purchase the Property for $42,175,000 (A. 566). At the time Pinado agreed to make an offer for the Property, she knew that the offer was a step in HRI's plan to become owner of the Property (A. 336, 632-633). Pinado believed that after they received the Madison Park offer, Daly's group would exercise their right of first refusal (Id.). Madison Park's offer was done as a favor because Madison Park knew that the offer would not be accepted because Daly's group had a

ROFR and was going to use the offer to "walk away with the Property" (A. 336, 628, 633).

Upon receipt of the offer, Daly did not notify the Limited Partners that the Partnership had received an offer (A. 337). Instead, Daly asked Madison Park to make a few non-substantive, typographical changes to the offer, solely for appearance purposes because he wanted the offer to "appear more credible" (A. 337, 651, 721).

The Limited Partners contemplated financial benefits from their investment in the Partnership in addition to tax credits (A. 415-416, 674). The initial draft projections showed that net operating income of the Property would increase over the life of the Project, which translates to an increase in value of the Property (A. 674). Moreover, the Partnership Agreement expressly contemplates additional financial benefits to the Limited Partners upon a sale of the Property.

Against all direction of the Limited Partners, on November 20, 2014, Memorial Drive issued a Disposition Notice to HRI and stating that the Partnership was willing to accept the offer subject to the consent of the Partnership's limited partner (A. 564). Memorial

Drive established that the Restricted Market Value price of the Property was $46,200,000 (A. 565). This price far exceeded the Madison Park offer price of $42,175,000 (A. 558). On November 26, 2014, the SLP issued a default notice to Memorial Drive and HRI affirming that the SLP "did not consent to the terms of the sale or the sale in general as proposed in the offer" which prevented the Partnership from issuing a Disposition Notice (A. 574). The SLP maintained that delivery of the Disposition Notice constituted a breach of the General Partner's fiduciary duty and demanded that the Disposition Notice be withdrawn (A. 574). On December 4, 2014, HRI issued a Purchase Notice informing the Partnership of HRI's intent to exercise the ROFR and set a closing date of April 2, 2015 (A. 577).

SUMMARY OF ARGUMENT

As discussed in Section I (p. 12-30), the unambiguous terms of the agreements do not permit a forced sale of the Property through exercise of the ROFR by HRI. The Decision impermissibly transformed the right of first refusal into an option to purchase (p. 13-14). Unlike an option holder, a holder of a ROFR cannot force a property owner to sell its

property (p. 14-20). The Decision renders the Option to be meaningless (p. 20-28). The Decision is also based upon an incorrect assumption that if HRI was not permitted to force a sale through the ROFR, the Property would no longer be operated as affordable housing (p. 28-30).

As discussed in Section II (p. 30-38), the Superior Court incorrectly considered the extrinsic evidence offered by the Plaintiffs to arrive at the Decision, and made findings of fact based on contested issues of fact (p. 30-33). The Superior Court relied upon the Plaintiffs' parol evidence, but ignored the Defendants' parol evidence and the terms of the Partnership Agreement, to arrive at the Decision (p. 33-35). The evidence showed that the draft projections did not represent the entire financial expectations of the Limited Partners (p. 34-38).

As discussed in Section III, Memorial Drive breached its fiduciary duties to the Limited Partners and its actions were not authorized by the Partnership Agreement and raised material issues of fact which should have prevented summary judgment (p. 38-50). Memorial Drive's conduct breached the implied covenant of good faith and fair dealing (p. 38-44). It is a

disputed fact whether Madison Park's offer to purchase the Property was a bona fide offer which is necessary to trigger the ROFR (p. 44-50).

ARGUMENT

I. THE UNAMBIGUOUS TERMS OF THE OPERATIVE AGREEMENTS DO NOT PERMIT A FORCED SALE OF THE PROPERTY THROUGH EXERCISE OF THE RIGHT OF FIRST REFUSAL.

A. The Superior Court's Decision Impermissibly Transformed the Right of First Refusal Into an Option to Purchase.

It is well settled that an appellate court reviews a grant of summary judgment *de novo* to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Pinti v. Emigrant Mortgage Co., Inc., 472 Mass. 226, 231 (2015) and Juliano v. Simpson, 461 Mass. 527, 529-530 (2012), *quoting from* Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). The appellate court accords "no deference to the decision of the motion judge." Pinti, 472 Mass. at 231; DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799, (2013). Moreover, the Superior Court's legal conclusions rest entirely on its interpretation of the unambiguous integrated written agreements, as to which this Court also is not

bound. Robert Industries, Inc. v. Spence, 362 Mass. 751, 755 (1973).

The issue before the Superior Court was whether the ROFR could be utilized by HRI to force a sale when the Property was not for sale and the Limited Partners, who held the power under the Partnership Agreement to decide whether and when to sell or not, did not wish to sell the Property. The Superior Court ruled that HRI could force the sale of the Property against the expressed desires of the Limited Partners even when the Property was not for sale. The Decision divested an important power of any property owner - the power to decide if and when to sell - from the Limited Partners and transferred this power to HRI as the holder of the ROFR. By doing so, the Superior Court eviscerated the well-recognized distinction between a ROFR and an option to purchase.

B. Unlike An Option Holder, a Holder of a Right of First Refusal Cannot Force a Property Owner to Sell.

The Superior Court ruled that "the SLP cannot hold up a transaction where HRI is acquiring the Property directly pursuant to Section 6 of the Option Agreement [the Option]. This Court concludes that [Section 5.5B(iv)] also means that the SLP cannot **hold**

up a transaction whereby HRI is exercising its ROFR under Section 3" (A. 762) (emphasis added). By using the words "hold up," the Superior Court necessarily believed that HRI had been granted the right to force the sale of the Property against the express wishes of the Limited Partners through the ROFR.

The Superior Court disregarded the well-established difference between an option to purchase - which is a property right that may be exercised without reference to a bona fide offer to purchase - and a ROFR, which is a contract right which permits its holder to right to respond to a bona fide offer, preserving a right to maintain control over property that is to be sold. In other words, an Option is a "sword" that can be affirmatively exercised to effect the purchase of the Property, which the ROFR is a shield that can be used defensively to prevent a sale to a third party.

A ROFR, in contrast with an option to purchase, does not give its holder the right to force an owner to sell its property, but rather is merely a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right. Uno Restaurants, Inc. v. Boston

Kenmore Realty Corp., 441 Mass. 376, 382 (2004), citing 25 S. Williston, Contracts § 67:85 (4th ed. 2002). The Massachusetts Supreme Judicial Court has also ruled that:

> A right of first refusal necessarily implies a right to choose between purchasing and not purchasing the premises **if the owner elects to sell them**. An owner cannot truly elect to sell until he has had an opportunity to do so, that is, until he has received a **bonafide** and enforceable offer to purchase. (internal citations omitted) (emphasis added).

Roy v. George W. Greene, Inc., 404 Mass. 67, 71 (1989).

The rights belonging to a holder of a ROFR are inferior rights to those belonging to a holder of an option because:

> [a] property owner's obligation under a right of first refusal **is not to sell at such a time that the holder of the right may demand (as in option to purchase)**, . . . but merely 'to provide the holder of the right seasonable disclosure of the terms of any bonafide third-party offer' that is acceptable to the owner. **The prerogative belongs both with the owner of the property, who may decide whether to sell**, as well as the holder of the right, who may decide whether to purchase at the price offered by the third party. At the time of a third-party offer that the owner has decided to accept, the right of first refusal ripens into an option to purchase according to the terms of the third party offer. (Internal citations omitted) (emphasis added).

Bortolotti v. Hayden, 449 Mass. 193, 201 (2007).

The distinction between an Option and a ROFR long recognized in Massachusetts is in accord with well settled black letter property law. It is an axiom of property law that the rights of a holder of a ROFR "are contingent upon the desire of the owner to sell." See, Restatement (First) of Property, § 413 comment b (1944) (cited with approval in Bortolotti, 449 Mass. at 201). As another noted commentator has stated:

> American law recognizes four basic types of agreement to sell land. Listed in order of the purchaser's increasing interest, these four types may be denominated:
>
> (1) the first call (often called referred to as the right of first refusal)
>
> (2) the option,
>
> (3) the executory contract, and
>
> (4) the so-called conditional sales contract.
>
> The first call merely gives the purchaser the first opportunity to purchase **if and when the vendor decides to sell, but imposes no duty on the vendor to sell to anyone.** The option gives the purchaser the right to purchase within a certain time, for a stated price, and under determined terms but imposes no duty of purchase . . .

11 Thompson on Real Property, Third Thomas Edition, § 96.03 (2015). As another well recognized and frequently cited commentator has explained:

> while a right of first refusal is closely related to the purposes of an option

> contract, a ROFR is very dissimilar in the legal relations of the parties and to include a ROFR as a variety of an option contract is confusing and logically inaccurate because a ROFR creates a contractual right to "preempt another."

3 Corbin on Contracts, § 11.3 (Rev. Ed. 1996). As further explained by another treatise on property law:

> A preemption differs materially from an option. An option creates in the option a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership. **A pre-emption does not give to the pre-emptioner the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price.**

Volume 6, American Law of Property, § 26.64 (1952).

There is no basis to argue that a ROFR under Section 42(i)(7)(A) is different than established well settled law.[1] Section 42 merely recognizes a right of first refusal generally and does not alter the definition of a ROFR. Id. When Section 42 was amended to add the concept of the right of first refusal, the drafters were aware that the rights of a holder of a ROFR are contingent upon the owner's

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[1] U.S.C. Code § 42(i)(7)(A) states "No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants . . . or by a qualified nonprofit organization . . ."

desire to sell as the Committee notes to Section 42(i)(7)(A) discuss that the ROFR is intended to allow the tenants to purchase the property for minimum purchase price "**should the owner decide to sell** (at the end of the compliance period)." See House Committee Report to the Original Enactment of the ROFR under the 1989 Act, p. 312 (1989) (emphasis added). Thus, a ROFR in an affordable housing project is no different than a traditional ROFR.

Massachusetts' common law, holding that a ROFR is a *preemptive* right which is only activated when the owner of a property has elected to sell it, is in accord with Court rulings across the United States which have consistently ruled that a ROFR gives "the prospective purchaser the right to buy … *but only if the seller decides to sell.*" Bennett Veneer Factors, Inc. v. Brewer, 73 Wash.2d 849, 853-54 (1968) (emphasis added). In other words, "the right of first refusal ripens when the owner forms a specific intention to sell the property." Northwest Television Club, Inc. v. Gross Seattle, Inc., 96 Wash.2d 973, 980 n.2 (1981). A necessary corollary is that a ROFR "does not entitle the holder to … negotiate the time and place of sale. … If the right holder wants the

privilege of negotiating terms or forcing a sale, *those additional rights should be obtained through an option.*" Matson v. Emory, 36 Wash.App. 681, 683 (1984) (emphasis added).[2] The Decision must be reversed as it is contrary to established Massachusetts precedent which does not allow HRI to force a sale of the Property by means of the ROFR.

C. The Superior Court's Decision Renders the Option Meaningless.

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[2] See also Mercer v. Lemmens, 230 Cal.App.2d 167, 170 (Cal.App. 1964) ("The distinction between an option and a preemptive right is well recognized in the law. A preemptive right does not give the pre-emptioner the power to compel an unwilling owner to sell."); Smith v. Mitchell, 301 N.C. 58, 61 (N.C. 1980) ("An option creates in its holder the power to compel sale of land, … A preemptive provision, on the other hand, creates in its holder only the right to buy land before other parties if the seller decides to convey it."); David A. Bramble, Inc. v. Thomas, 914 A.2d 136, 143-44 (Md.App. 2007) (unlike an option, the holder of a right of first refusal "has no unqualified power to compel a sale to him or to a third person"); SKI, Ltd. v. Mountainside Properties, Inc., 198 Vt. 384, 393 n.5 (Vt. 2015) ("Preemptive rights of first refusal and first offer are distinguishable from option contracts, which give the holder of the option power to compel an owner to sell property. A right of first refusal does not give the holder the power to so compel the owner."); Beets v. Tyler, 365 Mo. 895, 902 (Mo. 1956) ("A pre-emption differs materially from an option. An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership. A pre-emption does not give to the pre-emptioner the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption."); Stephens v. Trust for Pub. Land, 475 F.Supp.2d 1299, 1302 n.4 (N.D.Ga 2007) ("the owner's willingness to sell the property on the specified terms is a prerequisite for a preemptive right to 'ripen' into an option to purchase that property. Where the owner of the property is unwilling to sell, the holder of the preemptive right has no power to compel the seller to do so.").

1. The Negotiated Price Difference Between the Right of First Refusal and the Option Is Eliminated by the Superior Court's Decision.

Under the HRI Agreement, HRI was also granted an Option to purchase the Property. Unlike the ROFR - which HRI could exercise only in response to a *bona fide* offer by a third party to purchase the Property - HRI could exercise the Option at any time without the permission of the Limited Partners and regardless of whether the Property is for sale. The unilateral right to exercise the Option comes at a price: the purchase price was set in the HRI Agreement at the "Restricted Market Price," which is defined as a fair market value subject to the Property restrictions. The Partnership, and therefore the Limited Partners, would receive a fair market price upon a sale under the Option if HRI decided to exercise it, which is precisely why the Limited Partners consent is not required under the Option. In contrast, a purchase of the Property pursuant to exercise of the ROFR calls for a below market price. This negotiated price difference is eliminated and rendered meaningless if HRI is allowed to trigger the ROFR even when the SLP - the entity contractually empowered to approve a sale -

did not desire to sell the Property. Given that HRI is an affiliate of Memorial Drive, a self-triggering ROFR would also be particularly susceptible of self-dealing actions by Memorial Drive (the general partner) at the expense of the Limited Partners, which is precisely the situation here.

2. The Partnership Did Not Grant HRI the Power to Force A Sale Under the Right of First Refusal.

The parties unambiguously drafted the HRI Agreement to identify the circumstances under which HRI was permitted to force a sale of the Property, and when it was not. In Section 6, HRI was granted the Option to purchase the Property (A. 517). Section 6 also expressly provided that HRI could exercise the Option simply by notifying "the partnership in writing that it is exercising its option to acquire the Property ("Option Notice") at the Restricted Market Price." Notably (and entirely consistent with established Massachusetts legal precedent), when granting HRI the ROFR in Section 3, HRI was not similarly granted a right to exercise the ROFR by notice to the Partnership (A. 515).

Section 5.5.B(iv) of the Partnership Agreement restricts the authority of the General Partner,

expressly stating that the General Partner "shall not have authority… except with the Consent of the Special Limited Partner … [to] sell all or any portion of the Apartment Complex … subject to provisions contained in Section 5.4 hereof." The clear purpose for this restriction is to require Limited Partner approval for a capital event such as a sale of the Property and allows the Limited Partners to protect their real estate investment. A limitation to this restriction is contained in Section 5.4A, which provides that the General Partner is

> authorized to sell, lease, exchange, refinance or otherwise transfer, convey or encumber all or substantially all of the assets of the Partnership; **provided, however, that except for a sale pursuant to the Option Agreement** the terms of any such sale, exchange, refinancing or other transfer, conveyance or encumbrance must receive the Consent of the Special Limited Partner before such transaction shall be binding on the Partnership [emphasis added].

Although the HRI Agreement did not transfer the power to decide whether or not to sell the Property under the ROFR to HRI, the Superior Court nonetheless found that the absence of such a grant was cured by a clause in Section 5.4A of the Partnership Agreement, combined with Sections 2 and 3 of the HRI Agreement. This interpretation is entirely in contravention with

the limited preemptive rights held by the holder of a ROFR under well settled Massachusetts law.

HRI was not a party to the Partnership Agreement so it acquired no rights under it. Moreover, Section 5.4A does not grant any rights to HRI (A. 399). Additionally, the HRI Agreement differentiates between the two different rights which were granted two separate provisions. Compared with the right granted in Section 6 to unilaterally exercise the Option, nowhere in the HRI Agreement is HRI granted the power to exercise the ROFR at any time and regardless of whether the Limited Partners intended to sell the Property. In fact, HRI could not exercise the ROFR until it received a Disposition Notice from the Partnership (A. 516). The Partnership was not authorized to deliver a Disposition Notice, however, because the Partnership was not able to elect to sell to Madison Park without the SLP's consent. This proposed sale to Madison Park purported to trigger the ROFR, and this is not a sale under the HRI Agreement and therefore not covered by the exception to Section 5.4A. Hence, HRI was never granted the right, as found by the Superior Court, to exercise the ROFR at a time of its own election.

Reading the HRI Agreement against the backdrop of the well-recognized distinctions between the two distinct rights, it is clear that Sections 2 and 3 of the HRI Agreement were meant to apply only after the Limited Partners had decided to sell the Property. The Notice of Disposition discussed in Section 2 would arise only after the Partnership made a decision to "grant, sell . . . or otherwise dispose of its interest in the Property." As stated above, the Partnership cannot make these decisions without the consent of the SLP. Section 2 also outlined that the Disposition Notice would specify the "portion of the Property *proposed to be disposed* . . . the names and addresses of each person or entity *to whom the partnership proposes to make such disposition* . . . and all other terms *of the proposed disposition* and . . . a statement indicating whether the *Partnership is willing to accept the offer* . . ." Clearly, the presumption of the parties was that the ROFR would only arise if the Partnership made a decision to sell the Property and had identified a buyer to whom it intended to dispose it. Section 5.4A of the Partnership Agreement dictates that such a decision needed the consent of the Limited Partners.

The Decision strips away the Limited Partners' authority and power to decide when to sell even though this grant is not found in the ROFR within the HRI Agreement and is contrary to well settled law. The ruling also renders the Option moot. Based on the Superior Court's interpretation, HRI could exercise the ROFR as if it were an option and purchase the Property at a lower price than was possible under the Option by soliciting a below market offer from an entity which had neither the plans nor the means to purchase the Property. Based on this interpretation, HRI would never have any reason to exercise the Option which would have required it to pay fair market value because the ROFR also gave this fair market value price as one of three possible price options, along with two other price options and the power to choose the lowest of the three price options.

Courts are not empowered to rewrite the parties' agreements. It has been observed that "where 'it would have been a simple matter for' the contract drafter to include a term it now claims is brought within the sweep of arguably ambiguous contractual language, '[w]e see no reason to add th[at] term now.'" See Merrimack College v. KPMG LLP, 88 Mass.

App. Ct. 803, 807 (2016), *further app. rev. denied*, 473 Mass. 1112 (2016), *citing* Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 577 (2013).

Indeed, the Superior Court noted the merit of the Limited Partners' argument when it stated:

> If this Court were to look only at the Option Agreement, the Court would have some difficulty determining which side is the better of the argument. Certainly, Defendants' position has some superficial appeal: if this Court were to construe the ROFR as the Plaintiffs do, it is hard to see what purpose Section 6 serves - that is what additional rights it confers on HRI. (A. 758)

After recognizing that the Decision rendered the Option moot, the Superior Court then arrived at its ruling based on a fundamental misunderstanding of the rights of HRI under the ROFR and in reliance upon facts that are specifically disputed by the Defendants. The exercise of the ROFR was never a guaranteed right because HRI had the ability to purchase the Property before expiration of its rights under the HRI Agreement through its unconditional right to exercise the Option. In contrast, it had merely a conditional right to exercise the ROFR if and only if the Limited Partners consent to a sale of the

Property, and a third party made a *bona fide* offer to purchase it.

The Superior Court's analysis of the ROFR renders the Option negotiated by the parties meaningless and inoperative. The Option addresses the very concerns raised by the Superior Court where it stated - "if that consent of the SLP were necessary to trigger the ROFR, then it is hard to imagine a scenario by which HRI would be able to exercise the ROFR." That is precisely the point made by the Limited Partners: HRI was never guaranteed the right to exercise the ROFR when the Limited Partners did not want to sell and the Partnership was not even legally able to sell. In such a circumstance, HRI was, and is, still able to exercise the Option to purchase the Property at the Restricted Market Price.

D. The Superior Court Arrived at its Decision Based Upon an Incorrect Assumption.

When arriving at its decision, the Superior Court speculated that the Property may no longer continue to be operated as affordable housing, noting that since the holder of the right of the ROFR is a non-profit "the expectation is that the property will continue to be operated as affordable housing - an added public

benefit of such a transfer. That is not necessarily the case if the Limited Partners/Investors continue as owners, however." (A. 760). This speculation has no evidentiary basis and is in any event incorrect.

Indeed, the Property is subject to a long-term lease between the 808-812 Memorial Drive Housing Charitable Trust, as landlord, and the Limited Partnership, as tenant (A. 444). Among other things, the Lease requires that the Property be used in conformance with the document governing the Lease, which include an Affordable Housing Agreement between the Limited Partnership and the City of Cambridge and a use agreement with the Secretary of Housing and Urban Development, which all serve to guarantee that the Property will continue to operate as affordable housing regardless of whether or not there is a sale to HRI (A.354, 355, 358, 360, 453). The Property is operating, and will continue to operate, as an affordable housing complex.

Based upon the Superior Court's mistaken belief, and to avoid the perceived possibility that there *might* be a loss of affordable housing if the sale to HRI was not allowed, the Superior Court adopted an interpretation of the HRI Agreement which, while

linguistically possible, is unreasonable viewed in the context of the actual rights granted by the Limited Partners to HRI in the HRI Agreement. See Merrimack College, 88 Mass. App. Ct. at 806 ("the fact that KPMG's preferred reading is linguistically possible does not make it a reasonable interpretation of the parties' agreement"). The Superior Court's decision then impermissibly transformed the ROFR into an option, and rendered the actual option granted to HRI meaningless. For this reason, the Judgment entered in favor of the Plaintiffs should be reversed.

II. THE SUPERIOR COURT INCORRECTLY CONSIDERED EXTRINSIC EVIDENCE OF THE INTENT OF THE PLAINTIFFS, BUT NOT OF THE DEFENDANTS, AND MADE FINDINGS OF FACT ON CONTESTED ISSUES.

A. Plaintiffs' Parol Evidence Was Impermissibly Considered by the Superior Court.

The parol evidence rule bars consideration of extrinsic evidence to interpret unambiguous documents. A writing intended to be complete and final agreement and without ambiguity is not subject to parol evidence. See, e.g., Benford Mfg. Co. v. Standard Tire & Rubber Co., 235 Mass. 380, 382 (1920). Such an intent is usually expressed by an integration clause. See, e.g., Winchester Gables, Inc. v. Host Marriott Corp., 70 Mass. App. Ct. 585, 591 (2007). The parol

evidence rule "bars the introduction of prior or contemporaneous written or oral agreements that contradict, vary, or broaden an integrated writing" but "does not bar extrinsic evidence that elucidates the meaning of an ambiguous contract term." Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 496 (1997).

The Plaintiffs' claims are premised upon their rights under the Partnership Agreement and the HRI Agreement, both of which they agree are unambiguous. These two Agreements are fully integrated documents (A. 439 § 14.9; A. 519 § 12(b)). As such, the Superior Court's reliance on the draft projections and Daly's testimony was impermissible.

The Superior Court improperly considered what it found to be the intent of the parties. Indeed, in ruling on the Defendants' Motion to Strike, the Superior Court ruled that "the intent of the parties at the time the documents were executed is relevant to how the Court interprets the terms of the applicable agreements" (A. 770). The Superior Court also ruled that since Daly had personal knowledge as to what transpired in the negotiation of the agreements, he was therefore competent to testify "about what HRI

requested from the Limited Partners, what motivated that request, and why that was important to HRI" (A. 770). The Superior Court then found that based on the draft projections and Daly's testimony (but not the testimony of the Limited Partners which contradicted Daly) the Limited Partners had received all of the benefits they expected to receive in the form of tax benefits and that they had no expectation to receive benefits from a "later sale" of the Property (A. 760, 764).

Determination of the intent of the parties to a contract is only relevant and admissible if the contract is ambiguous. Kobayashi, 42 Mass. App. Ct. at 496. While the Superior Court was correct that "these agreements were negotiated against the backdrop of the LIHTC program, created by Congress to promote the production and preservation of affordable rental housing," construction of the HRI Agreement and the Partnership Agreement does not require the Superior Court to consider extrinsic factual evidence, as it did here, particularly where all parties agreed that the two agreements were unambiguous.

The Superior Court found that the draft projections as reflecting the full financial

expectations of the Limited Partners. While the Superior Court correctly notes that the Resnick Memo was part of the closing documents, it notably was not made part of the fully integrated HRI Agreement or the Partnership Agreement. Thus, the Reznick Memo was extrinsic evidence outside the agreements, and barred by the parol evidence rule. Based on the draft projections, the Superior Court found that "the benefit to the Limited Partners in providing equity to the project was not in a later sale but in the tax credits and benefit of tax losses that they would receive" (A. 753). The Superior Court then found that the Limited Partners introduced "no evidence disputing these projections" and that the "Partnership Agreement contains no language to support the claim that the Limited Partners expected to receive the residual value of the Property on a sale." (A. 764). The Decision was wrong on both of these findings.

B. The Superior Court Relied Upon the Plaintiffs' Parol Evidence But Ignored Defendants' Parol Evidence and the Terms of the Partnership Agreement.

1. The Limited Partners' Evidence Created a Factual Dispute as to Whether Projections Represented the Full Financial Expectations of the Limited Partners.

Contrary to the Superior Court's ruling where the Superior Court relied upon the draft projections and Daly's testimony as representing all of the financial benefits expected by the Limited Partners, the Limited Partners submitted documents and sworn testimony contradicting this contention. The sworn deposition testimony of the Limited Partners through their designated representative, Bryan Townsend, directly contradicted the Superior Court's ruling that the tax benefits contained in the draft projections represented all of the financial benefits expected by the Limited Partners.

Mr. Townsend testified that the draft projections showed that there was an expectation that net operating income would increase over the life of the Project, and so there was an expectation of an "increase in value [of the Property] at the end of the compliance period" (A. 674). Notably, the sworn testimony of Townsend shows that when asked for evidence which showed that an increase in market value was anticipated by the Limited Partners, he testified that the positive estimated net operating income calculated over the compliance period showed that the Limited Partners expected an increase in value to the

Property (A. 674). The Superior Court makes no mention of this testimony, although such evidence directly disputes Plaintiffs factual findings in the Decision. At a minimum, this evidence creates a factual dispute on the issue of the financial expectations of the Limited Partners ignored by the Superior Court, which is a basis to reverse the Superior Court's ruling.

2. The Partnership Agreement Showed the Limited Partners Expectations Were Not Limited to Tax Benefits.

The Superior Court incorrectly determined that "the Partnership Agreement contains no language to support the claim that the Limited Partners expected to receive the residual value of the Property on a sale" (A. 764). Rather, the Partnership Agreement contains provisions which demonstrate that the Limited Partners obtained the right to receive residual value of the Property on a sale which is in addition to any tax benefits. Several different sections of the Partnership Agreement, including Section 9.2B, address the financial benefits of being a Limited Partner upon the sale of the Property in addition to the potential tax benefits set forth in the initial draft projections.

The Limited Partners negotiated for and obtained the right to receive the residual value of the Property over and above the tax benefits discussed in the draft projections. In Section 9.2B of the Partnership Agreement, the distribution of proceeds from the sale to the Limited Partners was specifically addressed.[3] As set forth in Section 9.2B, the proceeds of a sale are to be distributed "49.99% to the Limited Partner, 50% to the General Partner, and .01% to the Special Limited Partner" after the payment in the other amounts to be paid in Section 9.2 (A. 415-416). The right to receive a benefit from a later sale is in addition to the tax benefits. Thus, the ruling made by the Superior Court that the benefit negotiated by the Limited Partners was limited to "the tax credits and benefit of tax losses that they would receive" and not from a "later sale" of the Property was erroneous.

In essence, the Superior Court had two choices when faced with the factual record presented here: it could determine that the Partnership Agreement and the HRI Agreement, read together, constituted an unambiguous agreement, which may be construed as a

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[3] Section 9.2A has a similar provision for cash flow proceeds beyond any tax benefits.

matter of law based on the arguments presented. Alternatively, the Superior Court could have determined that the agreements are ambiguous, permitting evidence of the parties' intent. The Superior Court could then conduct a trial, hear evidence of the parties' intent, and make findings of fact as to how the agreements are to be interpreted.

Instead, the Superior Court considered some - but not all - extrinsic evidence to make findings of fact on which it based its ruling. The Superior Court considered and accepted the Plaintiffs' extrinsic evidence of the Limited Partners' financial expectations, but ignored the testimony of the Limited Partners on the same subject. It is beyond dispute that a trial court, in ruling on a motion for summary judgment, is constrained to the issues of material fact as to which there is no issue in dispute, and is without authority to make findings of fact based upon contested evidence. Carey v. New England Organ Bank, 446 Mass. 270, 273-74 (2006). Here, the Superior Court acted as a trier of fact notwithstanding that there was a dispute about the expectations of the Limited Partners and then made a finding contravened

by terms of the Partnership Agreement. For these reasons, the Judgment should be reversed.

III. THE GENERAL PARTNER'S ACTIONS WERE A BREACH OF ITS FIDUCIARY DUTY AND WERE NOT AUTHORIZED BY THE PARTNERSHIP AGREEMENT AND CREATED MATERIAL ISSUES OF FACT.

A. Memorial Drive's Conduct Was Not Authorized By the Partnership Agreement and Breached Its Fiduciary Duty.

After acknowledging the fiduciary duty Memorial Drive owed to the Limited Partners, the Superior Court ruled that the "complained of conduct falls squarely within the scope of the applicable agreements" (A. 765). The "scope" being referred to are a few words in Section 5.4A of the Partnership Agreement which provide that a sale of the Property must receive the consent of the SLP "except for a sale pursuant to the Option Agreement" (A. 399).

However, "[t]he presence of a contract will not always supplant a shareholder's fiduciary duty," and "unless the contract clearly and expressly indicates a departure from those obligations, general fiduciary principles apply." Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 537-538 (2014); Merriam v. Demoulas Supermarkets, Inc., 464 Mass. 721, 727 n.14 (2012). When the contract does not entirely govern

the challenged actions, a claim for breach of fiduciary duty may still lie. Id. at 727; see Pointer v. Castellani, 455 Mass. 537, 554 (2009); King v. Driscoll, 418 Mass. 576, 586 (1994), 424 Mass. 1 (1996).

Unlike cases where the challenged conduct of a fiduciary clearly and expressly falls entirely within the scope of the contract, there is no language in Section 5.4A by which the Limited Partners even remotely agreed that, against their expressed wishes, Memorial Drive could conspire with HRI (not a party to the Partnership Agreement) in order to solicit an offer from a third party for the sole purpose of allowing HRI and Madison Park to self-trigger the ROFR and buy the Property for a lower purchase price than required by the Option. The few words of Section 5.4A never authorized Memorial Drive to solicit the offer from Madison Park and issue the Disposition Notice, let alone act in favor of HRI and against the interests of the Limited Partners solely to allow HRI to purchase the Property at a below market price when it was not even for sale. In order for Memorial Drive's actions to fall within the exception to the fiduciary duty common law principles and come under

the protection of the exception cases, its challenged conduct must fall "entirely within the scope" of these few words. Chokel v. Genzyme, 449 Mass. 272, 278 (2007).

For Memorial Drive's conduct to fall clearly and expressly entirely within the scope of the Partnership Agreement, Section 5.4A would have needed to allow Memorial Drive to (1) act against the express wishes of the Limited Partners (2) divulge the confidential information of the Partnership to HRI and a third party, Madison Park, without the consent of the Limited Partners, to be used against the interest of the Limited Partners (3) conspire with HRI to act in its best interest and against the interests of the Limited Partners, (4) solicit an offer solely to divest the Limited Partners of their majority beneficial interest in the Partnership and (5) deprive the Limited Partners of the market value of the Property, thereby triggering millions of dollars of tax obligations which the Limited Partners would not have faced but for the actions of Memorial Drive.

Section 5.4A did not contemplate, let alone expressly authorize, the many actions that Memorial Drive took for the benefit of HRI and to the detriment

of the Limited Partners. These actions of Memorial Drive, aided and abetted by HRI, were a breach of Memorial Drive's fiduciary duties. At a minimum, these challenged actions give rise to disputed issues of material fact which should have prevented the entry of summary judgment and which should be reversed.

B. Memorial Drive's Actions Breached the Implied Covenant of Good Faith and Fair Dealing.

The General Partner's solicitation of an offer to trigger the ROFR for the benefit of HRI and against the interests and wishes of the Limited Partners also are a breach of the covenant of good faith and fair dealing. Every contract implies good faith and fair dealing between the parties to it. Robert and Ardis James Foundation v. Meyers, 87 Mass. App. Ct. 85, 94 (2015); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991), *quoting from* Warner Ins. Co. v. Commissioner of Ins., 406 Mass. 354, 362 n.9 (1990). The implied covenant of good faith and fair dealing requires that "neither party … do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Anthony's Pier Four, Inc., 411 Mass. at

471-472, *quoting from* Drucker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976).

The Superior Court supported its decision by reference to the fact that Daly secured a letter from an attorney basically interpreting the agreements to allow HRI to solicit an offer (A. 766). Of course, the mere fact that Daly acted in line with a letter he asked be drafted does not provide immunity to Memorial Drive. The Superior Court ruled that "Daly's state of mind and intent as to his actions in 2013 and 2014 are also relevant in that his good faith has been questioned . . ." (A. 770). The Superior Court then impermissibly made factual findings in favor of the Plaintiffs and failed to draw any inferences in favor of the Limited Partners. *See* Weiler v. PortfolioScope, Inc., 469 Mass. 75, 84 (2014) (a factual review is necessary to determine whether defendant's motivation was "to affect negatively the plaintiff's rights" under the contract in order to determine whether a breach of implied covenant of good faith and fair dealing occurred). Anthony's Pier Four, Inc., 411 Mass. at 472-473. The required assessment of whether the Plaintiffs acted in bad faith and breached the implied covenant raised

material issues of fact which should have prevented the entry of summary judgment.

C. Material Issues of Fact Precluded Summary Judgment in Favor of the Plaintiffs.

As discussed *supra*, the Plaintiffs' conduct which triggered the ROFR also gives rise to genuine issues of material fact, precluding summary judgment. Memorial Drive as General Partner made the decision to sell the Property in contravention of the Limited Partners' direction not to sell the Property.

The evidence is abundantly clear that in Daly's efforts to serve two masters - Memorial Drive and HRI - he acted with utter disregard of, and against, the interests of the Limited Partners. From his earliest communications with the Limited Partners, Daly knew that the Limited Partners wished to delay the tax obligations resulting from a sale of the Property. On multiple occasions in 2013 and 2014, the Limited Partners rejected HRI's efforts to purchase the Property at a price consistent with the ROFR, notified HRI that the conditions necessary for the exercise of the ROFR had not occurred, and disputed HRI's attempt to purchase the Property other than through exercise of the Option (A. 537, 541, 548).

The Partnership Agreement did not contract away the General Partner's fiduciary duty to the Limited Partners - and indeed, expressly prohibited any waiver of fiduciary duty (A. 404). Consequently, Memorial Drive at all times owed the Limited Partners a fiduciary duty and its challenged conduct gives rise to disputed issues of material fact which prevents summary judgment on these important claims. Moreover, even if this Honorable Court were to rule that Section 5.4A did not limit the application of the Chokel line of cases, the actions of Memorial Drive taken against the interest of the Limited Partners and in favor of HRI were not expressly authorized by Section 5.4A.

At a minimum, all of the challenged conduct leading to the offer which Memorial Drive then used to issue the Disposition Notice, created material issues of fact which prevented summary judgment being granted in favor of the Plaintiffs.

D. It Is a Disputed Fact Whether Madison Park's Offer to Purchase the Property Was a Bona Fide Offer Necessary to Trigger the ROFR.

1. As A Matter Of Law, Only A Bona Fide Offer Can Trigger the ROFR.

One of the components required to trigger a right of first refusal is that "the owner has received a

bona fide and enforceable (written) offer from a third party." Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 709 (1992); Roy, 404 Mass. at 70. A third-party offer is bona fide if it was made "honestly and with serious intent," Mucci v. Brockton Bocce Club, Inc., 19 Mass. App. Ct. 155 (1985), that is, if the offeror genuinely intends to bind itself to pay the offered price. Uno Restaurants, 441 Mass. at 383. Therefore, "the right that a person with a right of first refusal has to choose either to purchase or not to purchase cannot be exercised before the owner has received a bona fide and enforceable (written) offer from a third party." Id. See Tamura v. DeIuliis, 203 Or. 619, 625-626 (1955) ("[T]he fact that the lessee was to have the first option to buy indicates . . . the usual situation whereby if the owner receives an offer from a third party, the . . . person having the first option to buy . . . shall have a right to meet any such bona fide offer of the third party"); King v. Dalton Motors, Inc., 260 Minn. 124, 127 (1961) ("Unless the context of the agreement indicates otherwise, the use of 'first option to buy' or a similar expression imports a preferential right on the part of the lessee to purchase the leased premises at

the same price and upon the same terms as contained in any bona fide offer from a third person acceptable to the lessor"); Brownies Creek Collieries, Inc. v. Asher Coal Mining Co., 417 S.W.2d 249, 252 (Ky. Ct. App. 1967); Vandenbergh v. Davis, 190 Cal. App. 2d 694, 697 (1961); DiMaria v. Michaels, 90 A.D. 2d 676, 677 (N.Y. App. Div. 1982). Thus, as a matter of law, the Madison Park offer needed to be a bona fide offer to trigger the ROFR.

2. It Is A Disputed Fact Whether the Offer Was Bona Fide.

Evidence of the origin of the offer amply demonstrates that the sole purpose of the offer was to trigger HRI's rights under the ROFR, that Madison Park made the offer as a "favor," and had no "genuine" interest to purchase the Property (A. 626-628).

Daly wanted an offer from Madison Park to trigger HRI's ROFR. Daly made it clear "that he was looking for Madison Park to make an offer so that it would trigger the right of first refusal so his group could purchase the Property" (A. 628). This caused Ms. Pinado to question the legality of this approach, which she characterized as a strategy used "to get rid of . . . investors." (A. 718). Prior to making the

offer, Madison Park never visited the Property, never inquired if there was a selling price for the Property, and never reported the subject of the potential acquisition to the Board of Directors of Madison Park (A. 629, 632). Madison Park had no prior information about the Property, and Daly decided which due diligence materials to give to Madison Park (A. 335).

When Madison Park made the offer to purchase the Property, Ms. Pinado knew that the Partnership did not intend to sell the Property to Madison Park (and likewise, Madison Park did not intend to buy the Property), and that the offer was merely a step in HRI's plan to acquire the Property (A. 336, 632-633). Madison Park knew that the offer would not be accepted, and that HRI would exercise the ROFR upon receipt of the offer to "walk away with the Property" (A. 626-628, 632-633). Instead of notifying the Limited Partners after the receipt of Madison Park's offer, Daly devoted his time to asking Madison Park to make changes to correct typographical changes. He did this in furtherance of the Plaintiffs' plans to make the offer "appear more credible." (A. 651).

This evidence collectively demonstrates that the offer received from Madison Park was not a bona fide offer. The Superior Court should have either ruled as a matter of law on the uncontroverted evidence that the offer was not a bona fide offer and, therefore, could not trigger the ROFR. In the alternative and at minimum, the Court should have ruled that there were material disputed issues of fact with regard to the bona fides of the offer, precluding summary judgment for the Plaintiffs. The Superior Court simply concluded that the offer was bona fide based on Pinado's testimony that Madison Park would have gone through with the purchase (at the below market price offered) if the offer was accepted.

This self-serving testimony does not eliminate all of the other submitted evidence, or the fact that the fact finder could choose to disbelieve the testimony. It is rare that a witness will admit to acting in bad faith. However, from the cumulative testimony of Madison Park and Daly, the fact finder certainly could determine that the offer was not a genuine and bona fide offer.

Madison Park had never purchased or considered purchasing any property outside of Roxbury. HRI alone

determined what financial materials about the property were provided to Madison Park in order for it to concoct its offer. Madison Park knew that HRI was looking for the offer to "trigger the right of first refusal" so HRI could purchase the property. Madison Park also knew that the Partnership did not intend to sell the property to Madison Park, and that "the offer was a step in HRI's plan to own the Property." (A. 632-633).

After recognizing that "Daly's state of mind and intent as to his as to his course of action in 2013 and 2014 are also relevant in that his good faith has been questioned," the Superior Court then implicitly and improperly found that he acted in good faith, in the face of a significant factual challenge to such action.

Questions requiring the weighing of conflicting evidence and the drawing of inferences are not susceptible to summary judgment. Regis College v. Town of Weston, 462 Mass. 280, 293-94 (2012); see also Carey v. New Eng. Organ Bank, 446 Mass. 270, 273-74 (2006) ("On review of summary judgment, we make all

permissible inferences favorable to the nonmoving party, here the plaintiffs, and resolve any disputes or conflicts in the summary judgment materials in their favor"). Daly's conduct, giving rise to the offer which Memorial Drive relied upon to authorize the issuance of the Disposition Notice - including the intent and state of mind of Daly - creates material issues of fact which prevent summary judgment being granted in favor of the Plaintiffs.

CONCLUSION

For the foregoing reasons, the Appellants request that this Court reverse the Judgment of the Superior Court.

APPELLANTS

By their Attorneys,
RIEMER & BRAUNSTEIN LLP

Date: April 13, 2017

Dennis E. McKenna, BBO# 556428
Riemer & Braunstein LLP
Three Center Plaza
Boston, Massachusetts 02108
(617) 880-3454
dmckenna@riemerlaw.com

CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

Dennis E. McKenna, counsel of record for the Appellants, Related Corporate V Special Limited Partner, L.P., and Centerline Corporate Partners V L.P., hereby certifies, pursuant to Mass. R. App. P. 16(k), that the Brief of the Appellants complies with all applicable rules of court concerning the filing of briefs, including Mass. R. App. P. 16(a), 16(e), 16(f), 16(h) and 20.

Dennis E. McKenna

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APPENDIX A

(iii) Certain unrented units treated as owner-occupied
In the case of a building to which clause (i) applies, any unit which is not rented for 90 days or more shall be treated as occupied by the owner of the building as of the 1st day it is not rented.

(4) New building
The term "new building" means a building the original use of which begins with the taxpayer.

(5) Existing building
The term "existing building" means any building which is not a new building.

(6) Application to estates and trusts
In the case of an estate or trust, the amount of the credit determined under subsection (a) and any increase in tax under subsection (j) shall be apportioned between the estate or trust and the beneficiaries on the basis of the income of the estate or trust allocable to each.

(7) Impact of tenant's right of 1st refusal to acquire property

(A) In general
No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(C)) or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).

(B) Minimum purchase price For purposes of subparagraph (A), the minimum purchase price under this subparagraph is an amount equal to the sum of—

(i) the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the 5-year period ending on the date of the sale to the tenants), and

(ii) all Federal, State, and local taxes attributable to such sale.

Except in the case of Federal income taxes, there shall not be taken into account under clause (ii) any additional tax attributable to the application of clause (ii).

(8) Treatment of rural projects
For purposes of this section, in the case of any project for residential rental property located in a rural area (as defined in section 520 of the Housing Act of 1949), any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income. The preceding sentence shall not apply with respect to any building if paragraph (1) of section 42(h) does not apply by reason of paragraph (4) thereof to any portion of the credit determined under this section with respect to such building.

(9) Coordination with low-income housing grants

(A) Reduction in State housing credit ceiling for low-income housing grants received in 2009
For purposes of this section, the amounts described in clauses (i) through (iv) of subsection (h)(3)(C) with respect to any State for 2009 shall each be reduced by so much of such amount as is taken into account in determining the amount of any grant to such State under section 1602 of the American Recovery and Reinvestment Tax Act of 2009.

APPENDIX B

10/11

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

HOMEOWNER'S REHAB, INC. and
MEMORIAL DRIVE HOUSING, INC.,

Plaintiffs,

v. Civil Action No. 14-3807-BLS2

RELATED CORPORATE V SLP, L.P. and
CENTERLINE CORPORATE PARTNERS V L.P.,

Defendants.

JUDGMENT (~~Proposed~~)

This action came on to be heard before the Court, Janet L. Sanders, Justice, presiding, upon the motion of plaintiffs, Homeowner's Rehab, Inc. ("HRI") and Memorial Drive Housing Inc. ("Memorial Drive"), for summary judgment pursuant to Mass. R. Civ. P. 56. The parties having been heard and the Court having considered the pleadings, memoranda, affidavits and exhibits, finds there is no genuine issue as to material fact and that HRI and Memorial Drive are entitled to a judgment as a matter of law on all three counts of their Complaint and all counts of the Defendants' Counterclaim should be dismissed with prejudice.

Notice 10/13/16 DEL ICEF DEM

Therefore, it is Ordered and Adjudged:

1. On Count I, that:

   a. Pursuant to the Partnership Agreement and Right of First Refusal Agreement, Memorial Drive, as General Partner, was authorized to solicit or entertain an offer from Madison Park Development Corporation ("Madison Park") to

JUDGMENT ENTERED ON DOCKET 10/13 2016
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

purchase the Property without obtaining the consent of the Special Limited Partner ("SLP") to do so;

b. The offer by Madison Park was sufficient for Memorial Drive to issue the Disposition Notice based on such offer;

c. Pursuant to the Partnership Agreement and Right of First Refusal Agreement, Memorial Drive was authorized to issue a Disposition Notice to HRI without obtaining the consent of the SLP to do so;

d. The Disposition Notice issued by Memorial Drive triggered HRI's right of first refusal;

e. After receiving the Disposition Notice, HRI was entitled to exercise its right of first refusal and obtain the Property at the lesser of the Section 42 price, the Third Party Price or the Restricted Market Price;

f. Memorial Drive has the authority to sell the Property to HRI without the consent of the SLP; and

g. HRI may acquire the Property according to the terms of HRI's Right of First Refusal Agreement and the Purchase Notice without the consent of the SLP.

2. On Count II, that the consent of the SLP to sale of the Property was not required prior to issuance of the Disposition Notice or sale of the Property to HRI.

3. On Count III, that Memorial Drive did not breach its fiduciary duty by soliciting the offer from Madison Park or issuing the Disposition Notice and, therefore, cannot be removed as General Partner.

4. Counts I-VII of the Defendants' Counterclaim are dismissed with prejudice.

5. HRI and Memorial Drive are entitled to their costs incurred in this action.

Dated at Boston, Massachusetts, this 6th day of October 2016.

Rachel V Mercado

ann - Clerk of the Court

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIV. NO. 14-3807 BLS2

HOMEOWNER'S REHAB, INC., and
MEMORIAL DRIVE HOUSING, INC.
Plaintiffs

vs.

RELATED CORPORATE V SLP, L.P. and
CENTERLINE CORPORATE PARTNERS V L.P.,
Defendants

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case arises from competing interpretations of agreements executed in connection with the rehabilitation of an affordable housing complex in Cambridge. Plaintiff Homeowner's Rehab Inc., (HRI) was the nonprofit sponsor of the development. Plaintiff Memorial Drive Housing Inc. (Memorial Drive) is the General Partner under a Limited Partnership Agreement entered into among the parties. Plaintiffs instituted this action this action against the Limited Partners, contending that the defendants' interpretation of that agreement together with a related Option Agreement effectively prevents HRI from exercising a right of first refusal conferred upon it when the partnership was formed. The defendants have asserted counterclaims alleging among other things that, in an effort to trigger that right of first refusal in favor of HRI, plaintiffs breached their fiduciary duties to defendants.

In July 2015 this Court (Roach, J.) denied plaintiffs' Motion for Judgment on the Pleadings (the July 2015 Decision). Although the Court noted that the plaintiffs appeared to be on strong ground in their interpretation of the relevant documents and that "much of what will

ultimately be required to construe the Agreement is already available," Judge Roach agreed with the defendants that there were factual issues remaining as to whether plaintiffs had put their own interests first in the manner by which they had gone about invoking their rights and obtaining an offer on the Property, particularly since she was bound at that stage in the proceedings to take as true all the factual allegations contained in defendants' counterclaims. Judge Roach also pointed out that Memorial Drive apparently had not given defendants access to the partnership's books and records, which might be relevant to the issues before the Court. Discovery was conducted, and the plaintiffs, essentially renewing the arguments they made before Judge Roach but on a more complete factual record, now move for summary judgment in their favor. This Court concludes that the plaintiffs' Motion must be **Allowed**.

BACKGROUND

The summary judgment record contains the following undisputed facts. In July 1997, the parties entered into an extensively negotiated and documented deal for the redevelopment, rehabilitation and financing of land and buildings located at 808-812 Memorial Drive in Cambridge as affordable housing (the Property). In furtherance of that project, the parties established a Limited Partnership, with their rights and obligations set forth in a Limited Partnership Agreement. Memorial Drive is the General Partner of the partnership. Defendant Centerline Corporate Partners V L.P. (Centerline) is the Limited Partner, and the defendant Related Corporate V SLP L.P (Related) is the Special Limited Partner or SLP. HRI was the nonprofit sponsor of the redevelopment of the Property and a majority owner of Memorial Drive. The partnership acquired a 99 year lease for the Property. The Property is owned by a charitable trust created by HRI, with HRI designated as the trust's sole beneficiary.

The Property consists of 211 affordable apartment units, 89 market rate units, commercial space and a 262-space parking garage. As a "qualified low-income housing project," it was eligible for financing under the Low Income Housing Tax Credit (LIHTC) provision of the Internal Revenue Code., 26 U.S.C. § 42 (Section 42). LIHTC projects generate tax credits for equity investors over a ten-year period and are subject to a 15-year "compliance" period in which they must be maintained as affordable housing if investors are to avoid recapture of the tax benefits. The compliance period for the Property here ended December 31, 2012.

Pursuant to the Partnership Agreement, the defendants as Limited Partners acquired a 99.98 percent interest in the partnership and made capital contributions of $6.9 million -- an amount directly tied to the amount of tax credits that the Limited Partners anticipated receiving. As General Partner, Memorial Drive made a small capital contribution but was to have "full and complete charge of the management of the business of the partnership in accordance with its purpose," Section 5.1A. That purpose is defined in Section 2.5A of the Partnership Agreement as "investment in real property and the provision of low income housing through the construction, renovation, rehabilitation, operation and leasing" of the Property.

As part of the deal and in accordance with Section 42, the Partnership executed a Right of First Refusal and Option Agreement (the Option Agreement). The Option Agreement was between the Limited Partnership and HRI (described as the "Holder"). The Option Agreement provided HRI with two potential mechanisms by which it could acquire the Partnership's interest in the Property. The first mechanism was set forth in Section 2 and 3 and gave HRI a Right of First Refusal (ROFR), described as "absolute, exclusive, and continuing." Section 2 described how and when this right could be exercised:

> Notice of Disposition: At any time commencing on the date hereof and ending on the date which is four years after the last day of the 15-year compliance period

> with respect to the Property pursuant to Section 42 of the Code, the Partnership shall not directly or indirectly grant, sell, transfer, exchange, assign, give or otherwise dispose of its interest in the Property without it first being offered in writing to the Holder in accordance with the terms and conditions of this Agreement and until at least ninety (90) days after the Partnership shall have delivered to the Holder notice of an offer to purchase the Property from such purchaser (hereinafter the "Disposition Notice"). The Disposition Notice shall specify the portion of the Property proposed to be disposed, the names and addresses of each person or entity to whom the Partnership proposes to make such disposition, the consideration payable therefor ("the Third Party Price"), and all other terms of the proposed disposition, together with a copy of any executed or proposed agreement(s) setting forth the terms of the proposed disposition and all other instruments related thereto, a statement indicating whether the Partnership is willing to accept the offer and the Partnership's estimate of the Restricted Market Price as hereinafter defined.

As to the price that HRI would pay if it were to exercise its ROFR, that was described in Section 3 of the Option Agreement: HRI could acquire the Partnership's interest for the lesser of three prices: a) the "Section 42 Price" (a term defined by 26 U.S.C. 42((i) (7)); b) the "Third Party Price as specified in the Disposition Notice," or c) the "Restricted Market Price." The Restricted Market Price is fair market value, subject to certain restrictions encumbering the Property.

The second mechanism by which HRI could acquire the interest of the Partnership was set forth in Section 6 of the Option Agreement. That provision stated that HRI could, at the end of the 15-year compliance period, make its own offer to acquire the Property. As to what the purchase price would be, only one option was given: HRI had to pay the Restricted Market Price. Under this provision, the Partnership could dispute the price proposed by HRI and the matter would then be submitted to an appraiser.

The Partnership Agreement specifically references the Option Agreement (defined under the Partnership Agreement to include the RFOR), and gives some indication as to the parties' intentions in executing it. For example, Section 5.4.C(iii) of the Partnership Agreement states:

"The partnership and HRI agree that, with respect to the Option Agreement, it is their intention that the purchase price under the Option Agreement be the minimum price consistent with the requirements of Section 42(i)(7)." The Partnership Agreement makes another reference to the Options Agreement which is important to resolution of the issues before the Court: Section 5.4A states:

> The General Partners...are hereby authorized to sell...all or substantially all of the assets of Partnership; provided, however, that, except for a sale pursuant to the Option Agreement, the terms of any such sale must receive the consent of the Special Limited Partners before such transaction shall be binding on the partnership.

In other words, if the proposed sale was pursuant to the Option Agreement, the SLP's consent was not required.

In connection with the negotiation of these agreements, HRI requested that the defendants provide it with financial projections as to the anticipated return on their investment. The defendants provided a memorandum from the firm of Reznick, Feder & Silverman dated May 21, 1997 (the Reznick Memo). See Exhibit S of Joint Appendix. The Reznick Memo was part of the closing documents. That memo projected that the Limited Partners would receive $6.9 million tax credits between 1997 and 2012 - an amount which coincided with their capital contribution. The Reznick Memo also projected what return the Limited Partners would receive in the event the Partnership interests were sold December 31, 2012 for $1 over the mortgage balance. Taking into account the tax benefits they would receive and even after payment of any exit taxes resulting from the sale, the Limited Partners could be expected to net $3.3 million over their capital contribution of $6.9 million. In other words (as described by the Memo), the benefit to the Limited Partners in providing equity for the project was not in a later sale but in the tax credits and benefit of tax losses that they would receive. They did in fact reap such benefits: from 1997 when these agreements were executed up to the end of the compliance

period in 2012, the Limited Partners received approximately $7.5 million in tax credits and took advantage of over $24 million in tax losses.

After the compliance period had run, Peter Daly contacted Centerline in October 2013 about HRI's acquiring the Limited Partners' interest in the Property. Daly is Executive Director of both HRI and of Memorial Drive, the General Partner. As to what HRI would pay, Daly proposed using the "Minimum Price Methodology" that was attached to the Partnership Agreement as Schedule C. The title to that document is: "Projection of General Partner Purchase Price upon Sale or Disposition of the Project on 12/31/2012" and is further described as the "Section 42 Price pursuant to the Right of First Refusal." As noted above, the "Section 42 Price" was one of the options for calculating purchase price if HRI was exercising its ROFR under Sections 2 and 3 of the Option Agreement; it was not an option under Section 6 where HRI made an offer independent of exercising its ROFR in the face of a third party offer. As Daly explained in his affidavit, "HRI was attempting not to invoke the ROFR but rather to buy out the Limited Partners interest using the Minimum Methodology rather than going through the lengthy ROFR process of soliciting and responding to an offer." It was his belief that the agreements entitled him to insist on the buyout price he had proposed. As he testified to at his deposition, "it was always our intention to acquire the property, in accordance with our agreement of debt plus a dollar, and that was what our offer was going to be." See Daly deposition, p. 33 (Exhibit U of Joint Appendix).

Interpreting the language of the agreements differently, the defendants did not agree to the purchase price that Daly proposed and insisted that, if HRI was to acquire the Limited Partners' interest, it had to do so directly, pursuant to Section 6 of the Option Agreement. The purchase price under that section was the Restricted Market Price. As to whether HRI could rely

on Sections 2 and 3 of the Option Agreement, the defendants took the position that those sections applied only if the Partnership were willing to sell to a third party and that required the consent of the Special Limited Partner. Without their consent, they maintained that Memorial Drive as the General Partner was not in a position to solicit or even entertain offers from third parties, and without such a third party offer, the ROFR (with its Section 42 price option) was simply not triggered.

Multiple letters and emails were exchanged between January and June 2014 regarding the parties' different interpretations of what the agreements required if HRI was to buy out the defendants. Among those communications was a letter from HRI's counsel to Daly dated June 4, 2014. Counsel advised Daly to solicit offers on the Property so as to trigger the ROFR if the defendants continued to resist a consensual acquisition of the partnership's interest at the price Daly had proposed. This letter was forwarded to the defendants, but they continued to adhere to their interpretation that the ROFR could not be triggered as long as the Limited Partners were unwilling to consent to a third party sale.

The ROFR was due to expire on December 30, 2016. With that date approaching, Daly decided to contact Jeanne Pinado of the Madison Park Development Corporation (Madison Park), another nonprofit organization that develops affordable housing properties in Boston. He asked Pinado to make an offer on the Property and provided her with the necessary financial information for doing that. On November 19, 2014, Madison Park submitted a written offer to purchase the partnership's interest in the Property for $42,175,000. It made an initial deposit of $10,000.

Pinado's deposition and certain email exchanges between her and Daly are part of the summary judgment record and reveal the following. Daly and Pinado knew each other

through their common work in affordable housing over two decades. Pinado agreed that Daly had reached out to her asking Madison Park to make an offer on the Property as a "favor." She also knew that any offer Madison Park did make was subject to an ROFR that HRI was likely to exercise. On November 19, 2014, Madison Park did make an offer – one that Pinado described as being a "good" one that was an "appropriate offer for the Property," based on Madison Park's own analysis of materials that Daly had supplied about the Property. "It was a "preservation price...a price that we would pay knowing that we wanted to preserve this property as affordable housing in perpetuity." Pinado Deposition at page 49 (Exhibit T of Joint Appendix). Pinado testified that she believed that the offer was one that the partnership would accept if HRI did not exercise its ROFR and was one that Madison Park was prepared to honor and that it "had the resources to do." Defendants have not offered any specific evidence to the contrary Although Madison Park had not developed any affordable housing outside of Boston, Pinado testified that she would look to partner with an entity in Cambridge that was more familiar with the particular needs of that community in the event that the deal went through.

On November 20, 2014, Daly on behalf of Memorial Drive (the General Partner) issued what it regarded to be the Disposition Notice required by Section 2 of the Option Agreement. The Disposition Notice stated that: "The Partnership is willing to accept the offer [which the Notice enclosed] subject to consent of the Partnership's limited partner." It went on to state that the Partnership's estimate of the Restricted Market Price was approximately $46,200,000. The Notice was sent to HRI and also to the defendants.

Centerline responded by letter dated November 26, 2014 entitled "Default Notice." In this letter, Centerline once again reiterated its position that the General Partner had no authority to sell or accept any offer on behalf of the Partnership without the SLP's consent. In support, it

relied on the language of the relevant agreements.[1] Without such authority, it maintained that Memorial Drive could not issue the Disposition Notice. Moreover, in doing so, Memorial Drive had (according to Centerline) breached its fiduciary obligations under the Partnership Agreement.

On December 4, 2014, HRI issued a Purchase Notice informing the Partnership that it intended to exercise the ROFR. As explained in that notice, both the offer by Madison Park and the Section 42 Price were below the total amount of mortgage debt secured by the Property, which HRI would agree to assume. Thus, pursuant to the ROFR, HRI would not be required to pay any additional amounts to the defendants. It being clear that the defendants would not permit the sale, HRI together with Memorial Drive filed this lawsuit for declaratory relief.

DISCUSSION

Counts I, II and III of the Complaint seek declarations as to the parties' respective rights and obligations in connection with the ROFR. In their Counterclaim, the defendants allege breach of fiduciary duty, aiding and abetting such breach, and breach of the covenant of good faith and fair dealing. They also seek the removal of Memorial Drive as a General Partner and an injunction against the sale of the Property.[2] This Court concludes that plaintiffs are correct in their interpretation of the relevant documents. Because the Counterclaim is based on conduct that the relevant contracts clearly permit and because there is no additional evidence of bad faith

[1] At some point, Centerline had been bought out by another entity. This change of ownership is relevant for purposes of this case only in that the investors who actually entered into the Partnership and Option Agreements in 1997 were no longer in the picture in 2014. There is thus no one on the defendants' side who can offer any evidence as to the intent of the parties, at the time the agreements were executed, regarding the meaning of contract terms beyond what the contracts themselves say.

[2] Although plaintiffs had set a closing date for the sale to HRI, they agreed not to proceed with that sale until the Court issued its July 2015 decision. The plaintiffs have made no effort to proceed with the sale since then.

on the plaintiffs' part, this Court also concludes that the counterclaims must be dismissed. This Court turns to the contract issue first.

I. The Parties' Contractual Rights and Obligations

The positions that the parties take regarding the meaning of the applicable agreements are essentially the same as the positions they took when Daly first approached the defendants about HRI's acquiring the Partnership interests in the Property. Rebuffed in his offer that HRI buy out the Limited Partners for what was essentially the Section 42 Price, he took steps to trigger HRI's Right of First Refusal by soliciting the third party offer from Madison Park. Defendants maintain (as they did then) that Memorial Drive had no authority to do that because the Limited Partners had not consented to any sale. Although such consent was not required if HRI was itself to make an offer to acquire the Property, that transaction was governed by Section 6 of the Option Agreement, which permitted the Limited Partners to demand a much higher sales price. In response, the plaintiffs rely on certain provisions of the Partnership Agreement that define the General Partner's authority and ask that this Court interpret both that agreement and the Option Agreement as a whole and against the backdrop of Section 42.

If this Court were to look only at the Option Agreement, this Court would have some difficulty determining which side has the better of the argument. Certainly, defendants' position has some superficial appeal: if this Court were to construe the ROFR as the plaintiffs do, it is hard to see what purpose Section 6 serves – that is, what additional rights that it confers on HRI. On the other hand, to construe the ROFR as the defendants do would essentially render Section 3 meaningless. If the General Partner could not solicit or even entertain a third party offer without the Limited Partners' consent, then the Limited Partners could simply withhold their consent -- not an unreasonable position to take, since they know that they could get a higher

price if HRI was forced to purchase their interest outright. If that consent were necessary to trigger the ROFR, then it is hard to imagine a scenario in which HRI would be able to exercise the ROFR, particularly since that right existed only between December 31, 2012 and December 31, 2016 when it expires.

The Option Agreement, however, cannot be read in isolation. It must be construed together with the Partnership Agreement and in line with the intent of the parties at the time that they executed these two contracts. Moreover, in order to understand the purpose of these documents, this Court does find it helpful to consider the context in which they were negotiated and the purpose of having a nonprofit entity like the plaintiffs join together with private investors looking for a return on their dollar. Specifically, these agreements were negotiated against the backdrop of the LIHTC program, created by Congress to promote the production and preservation of affordable rental housing. An understanding of that program thus informs this Court's conclusions.

A. The LIHTC Program (26 U.S.C. §42)

The joint venture that these contractual documents set up is one that is encouraged by Section 42 of the Tax Code, which provides subsidies in the form of tax credits to developers of affordable housing. The partnership arrangement between the plaintiffs and the defendants is a fairly typical one. [3] The developer joins with equity investors who generate enough federal tax liability to enjoy the full value of those tax credits. Where the developer is a non-profit entity (as here) that is particularly necessary since the tax credits have no value to a tax-exempt

[3] To understand the LIHTC program that set up these tax credits, this Court found particularly helpful two publications cited by plaintiffs. One was authored by a policy division of the Department of Housing and Urban Development. Khadduri, Jill et al. *What happens to Low Income Housing Tax Credit Properties at Year 15 and Beyond*? U.S. Department of Housing and Urban Development/Office of Policy Development and Research (Washington D.C. August 2012). The second source was: Mittereder, Eric, *Pushing the Limits of Non-Profit Guarantees in LIHTC Joint ventures,* Journal of Affordable Housing, vol. 22, No. 1, pp. 80 et seq.

organization. In order to obtain the benefit of these credits, the investors are required by the Tax Code to hold a majority of the equity in the project and thus make the larger capital contribution. To maximize the equity generated by the credits, the investors as limited partners typically take a 99 percent partnership interest. That is precisely what happened here.

The developer as General Partner (here Memorial Drive) has day to day managerial responsibility for developing and operating the real estate, ensuring compliance with use restrictions, and seeing to long term asset management. Although the General Partner may be compensated for its work through developer fees, the real incentive lies in its ability to acquire the projected back from the partnership at the end of the 15 year compliance period. By that that time, Limited Partners will have reaped the full benefit of the tax credits after the 15 year period. A study by the Department of Housing and Urban Development notes that the great majority of qualified projects result in a transfer of the investors' interest in the property to the General Partner or its subsidiary at the end of this 15 year period. See footnote 3, supra. Where the developer is a nonprofit, the expectation is that the property will continue to be operated as affordable housing – an added public benefit of such a transfer. That is not necessarily the case if the limited partner/investors continue as owners, however.

Section 42 explicitly envisions that qualified nonprofit developers or sponsors like HRI may be granted a right of first refusal to acquire the project back from the partnership for a minimal purchase price at the end of the compliance period. In non-profit sponsored deals, the price often attached to the exercise of that right is the so-called Section 42 Price, where the investors realize little cash (having already enjoyed the benefit of the tax credits) but are relieved of the outstanding debt, which the developer assumes. If the General Partner is required to finance a sales price exceeding that debt, that will in turn limit the cash flow that is available for operating

the property and meeting its capital needs over time. A transfer of the ROFR at the Section 42 price thus contributes to the overall goal of promoting the continuing availability of affordable housing.

This Court's job, of course, is to interpret the documents before me, not necessarily to promote any particular policy agenda. That is, the Tax Code permits an ROFR precisely like the one at issue here but the terms upon which HRI may exercise it depends on the agreements that were actually negotiated. Still, the Partnership Agreement itself expressly recognized that one of the primary purposes of the Partnership is to provide affordable housing so that purpose is relevant in interpreting its provisions. The powers and responsibilities that the Partnership Agreement confers on the General Partner are also important to this Court's interpretation of the Option Agreement. This Court thus turns to the wording of those documents, construing them together as a whole and in line with what the parties intended at the time they were drafted.

B. The Agreements

Under Section 2 of the Option Agreement, the ROFR is triggered when the "Partnership" delivers a notice to the Holder (HRI) that there is an offer to purchase the Property. This Disposition Notice shall specify, among other things, the terms of "any executed or proposed agreement" from a third party to buy the Property, and "a statement indicating whether the Partnership is willing to accept the offer." (Emphasis added). In other words, the offer need not be accepted by the Partnership nor need it be ready and willing to do so in order to trigger the ROFR. The Disposition Notice regarding Madison Park's offer stated that it was "subject to consent of the Partnership's limited partner." The question before the Court is whether Memorial Drive could solicit or otherwise entertain this offer and issue the Disposition Notice without first

getting the Limited Partners' consent to do so. Based on this Court's reading of the Partnership Agreement, this Court concludes that it could.

As described by the Partnership Agreement, the powers of the General Partner are quite broad. As General Partner, Memorial Drive was given "full and exclusive and complete charge of the management of the business of the Partnership in accordance with its purpose," that purpose being the provision of low income housing. Section 5.1A. It is "authorized to take all action necessary to carry out the purposes of the Partnership." Section 5.2A(i). It has the sole right" to act on behalf of the Partnership and is authorized, "without the requirement of any act or signature of the other Partners...to execute any and all instruments, agreements, contracts, certificates, or documents requisite to carrying out the intention and purpose of this Agreement..." Section 5.3A(v). As to the power to sell or dispose of the Property, that is dealt with in Section 5.4A, which says that the General Partner may "sell lease, exchange, refinance, or otherwise transfer, convey or encumber all or substantially all of the assets of the Partnership so long as it has the "consent of the Special Limited Partner before such transaction shall be binding on the Partnership." See also 5.5B(iv). There is one important exception to that restriction, however: if the sale is "pursuant to the Option Agreement," then the SLP's consent is not required. Thus, the SLP cannot hold up a transaction where HRI is acquiring the Property directly pursuant to Section 6 of the Option Agreement. This Court concludes that this section also means that the SLP cannot hold up a transaction whereby HRI is exercising its ROFR under Section 3. To construe Section 2 and 3 to require the Limited Partners' consent before a Disposition Notice can issue would mean that the Limited Partners could hold up a sale to HRI – a possibility clearly prohibited by the Partnership Agreement.

Defendants argue that, since a sale to a third party cannot be consummated without the SLP's consent (a proposition that plaintiffs concede), it necessarily follows that the General Partner cannot solicit or accept a third party offer without such consent as well. To conclude otherwise would "eviscerate the General Partner's fiduciary duty by forcing the sale of the Property to HRI against the express wishes and the financial best interests of the Limited Partners." Se Memorandum in Opposition to Motion, p. 5. This Court fails to find anything in the Partnership Agreement, however, which would prevent Memorial Drive from doing exactly what it did here.[4] Indeed, as already explained above, the General Partner's powers are quite broad. As to the financial interest of the Limited Partners and the expectations they had when they entered into these agreements, the Partnership Agreement itself, together with the Closing Documents that were part of that deal, do not support defendants' position that they will somehow be deprived of their bargained for benefits.

Section 5.4C(iii) speaks directly to what the parties anticipated would occur: "The Partnership and HRI agree that, with respect to the Option Agreement, it is their intention that the purchase price under the Option Agreement be the minimum price consistent with the requirements of Section 42(i)(7)." The parties' agreed upon methodology for calculating the Section 42 Price was attached to the Partnership Agreement as Schedule C. There is no real dispute (at least for purposes of this Motion) that application of this methodology would require HRI to pay $0 or $1 in cash to the Limited Partners to acquire their interest in the Property. As to the projected benefits that the Limited Partners would receive, those were outlined in the projections made in the Reznick Memo. Taking into account the tax benefits together with the

[4] Daly did not pursue the course of action that he did without obtaining legal advice from his own counsel – advice he shared with the defendants before he reached out to Madison Park. This advice is not binding on this Court, but it does have some bearing on the question of whether Daly proceeded in good faith.

anticipated tax losses that they would receive over the 15 year compliance period together with the exit taxes they would have to pay in the event of a sale, the Limited Partners would still stand to realize a net profit of $3.3 million over and above their original investment – a 17.519 percent of return on their initial investment. Thus to interpret the ROFR as the plaintiffs do would not deprive the defendants of the benefit of their bargain.

In considering these projections, this Court does not run afoul of the parol evidence rule, as defendants contend. The Reznick Memo was part of the Closing Documents. Moreover, those projections, and certain statements made in Daly's affidavit regarding why they were important, are not offered by the plaintiffs to alter or contradict the terms of either agreement; rather, they are offered to support their interpretation of the terms and their position that such interpretation is in line with the expectations of the parties at the time the documents were executed. Signficantly, the defendants offer no evidence disputing these projections. Moreover, the terms of Partnership Agreement make it clear maximizing the tax benefits for the Limited Partners was a key component of the arrangement. Indeed, the Partnership Agreement contains no language to support the claim that the Limited Partners expected to receive the residual value of the Property on a sale.

II. The Counterclaims

The defendants claim that, even if this Court were to conclude that Memorial Drive's actions were not strictly prohibited by the agreements, the General Partner's "complicity" in offering the Property for sale to Madison Park breached its fiduciary duty to the defendants breached the covenant of good faith and fair dealing, and that HRI aided and abetted in that wrongdoing. At the very least, they argue that there are disputes of material fact as to these claims. This Court disagrees.

This Court recognizes that a general partner owes a fiduciary duty to the limited partners in a limited partnership and that this duty requires adherence to the "highest standards of good faith and fair dealing" in the performance of contractual obligations. Krapf v. Krapf, 439 Mass. 97, 103 (2003); see also Donahue v. Rodd Electrotype Co., 367 Mass. 578, 593 (1971). It is also true, however, that the contours of that fiduciary duty are subject to contract. Fronk v. Fowler, 456 Mass. 317, 331 (2010). Where the contested action falls entirely within the scope of a contract between the parties, and the defendant has acted in good faith in compliance with that contract, its conduct cannot give rise to a claim for breach of fiduciary duty. Chokel v. Genzyme Corp., 449 Mass. 272, 278 (2007); see also Blank v. Chelmsford Ob/Gyn, P.C. 420 Mass. 404, 408-409 (1995). As to the claim for breach of the covenant of good faith and fair dealing, "the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." Uno Restaurants v. Boston Kenmore Realty Corp., 441 Mass. 376, 386 (2004). It requires that "neither party...do anything that will have the effect of destroying or injuring the right of other party to receive the fruits of the contract." Anthony's Pier Four Inc. v. HBC Associates, 411 Mass.451, 471-472 (1991). The covenant may not, however, "be invoked to create rights and duties not otherwise provided in the contractual relationship." 441 Mass. at 386.

Applying these principles to the instant case, this Court concludes that the complained of conduct falls squarely within the scope of the applicable agreements. Because this Court has concluded that the plaintiffs were contractually authorized to engage in the conduct that is the subject of these counterclaims, it necessarily follows that they cannot be held liable under these alternative tort based-theories.

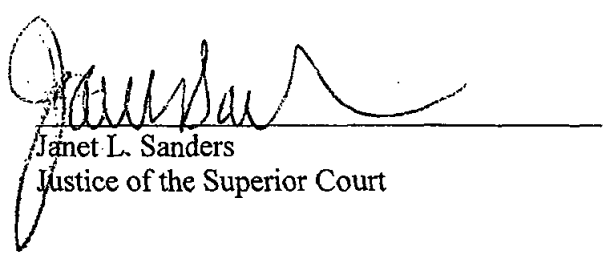
In support of these counterclaims, the defendants characterize the solicitation and receipt of the offer from Madison Park as a "sham" and part of a "secret scheme" concocted to trigger the ROFR. The assertion that this was somehow secret, however, is not supported by the summary judgment record. When the defendants insisted that HRI could acquire the Property only pursuant to Section 6 of the Option Agreement, Daly all but announced the fact that he would be soliciting third party offers when he enclosed in a June 2014 email to the defendants a letter from his counsel instructing him to consider doing exactly that. See fn. 4 supra. He did so only after months of communications between the parties made it clear that they fundamentally differed in what the applicable agreements permitted the General Partner to do. As to the fact that Madison Park's offer was solicited, there is nothing in the agreements to prohibit such solicitation, which would seem in any event to be the only way of testing whether HRI intended to invoke its ROFR: anyone familiar with LIHTC projects would have to know that such rights and would be unlikely to make an offer if it were not solicited. That Pinado knew that HRI was likely to exercise the ROFR does not make Madison Park's offer any less enforceable or somehow mean that it cannot qualify as the type of offer sufficient to trigger the ROFR.

Finally, the ROFR is not a typical right of first refusal but rather a statutorily defined one designed to allow non-profit entities to buy back property at the end of the 15 year compliance period at a preset price which (depending on market conditions) is substantially below fair market value. While a third party offer may be necessary to trigger it, the amount of that offer will not have any impact on what the nonprofit has to pay unless that offer is less than the Section 42 Price. Thus, that Madison Park's offer was $4 million less than the Restricted Market Price is essentially irrelevant. What is necessary is that the third party offer be enforceable and

Madison Park's offer qualified as such: it was in writing, contained all essential terms, and was accompanied by a $10,000 deposit. Defendants present no evidence to contradict Pinado's testimony that she had the resources and the intent to go through with it in the event HRI did not exercise its ROFR. That is enough.

CONCLUSION AND ORDER

The Plaintiffs' Motion for Summary Judgment on their own claims and on the Counterclaims of the Defendants is **ALLOWED** in its entirety. The parties will confer as to a proposed form of judgment. In the event that there is disagreement, the different proposals will be served with this Court in compliance with Rule 9A and any disputes will be resolved at a hearing on October 15, 2016 (formerly the date for a Final Pretrial Conference). The Trial Date of November 29, 2016 is cancelled.



Janet L. Sanders
Justice of the Superior Court

Dated: September 13, 2016

APPENDIX D

NOTIFY

NOTICE IN HAND
09.13.16
L.L.+F.

24

(MT)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

NOTICE SENT
09.14.16
R.+B.
D.E.M.

SUPERIOR COURT
CIV. NO. 14-3807 BLS2

(MT)

HOMEOWNER'S REHAB, INC., and
MEMORIAL DRIVE HOUSING, INC.
Plaintiffs

vs.

RELATED CORPORATE V SLP, L.P. and
CENTERLINE CORPORATE PARTNERS V L.P.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO STRIKE

In support of their Motion for Summary Judgment, the plaintiffs offered the Affidavit of Peter Daly. Defendants move to strike certain portions of that affidavit. That motion is **DENIED** in part and **ALLOWED** in part. This Court offers the following by way of explaining its rulings.

1. The intent of the parties at the time the documents were executed is relevant to how the Court interprets the terms of the applicable agreements, not because that evidence would contradict those terms but rather in considering how it does or does not support the position of the parties in their respective interpretations. As executive director of both the plaintiffs, Daly was actively involved in the negotiation, structuring and financing of the deal at issue and thus has personal knowledge as to what transpired in those negotiations with the Limited Partners. He is therefore competent to testify about what HRI requested from the Limited Partners, what motivated that request, and why that was important to HRI.

2. Daly's state of mind and intent as to his course of action in 2013 and 2014 iare also relevant in that his good faith has been questioned, and his statements are admissible for that purpose. His testimony characterizing certain communications from the defendants would not be admissible. Those communications speak for themselves.

3. As to the Reznick memorandum, Daly is in a position to describe and explain the figures contained therein and to testify to what importance he attached to those figures. He cannot offer an opinion as to what he thinks that shows about the defendants' expectations (although this Court can itself draw such inferences depending on what other evidence is contained in the summary judgment record).

With these reasons in mind, the Court **STRIKES** the following portions of Daly's affidavit: those portions of paragraph 12 where Daly purports to describe the defendants' intentions or expectations; that portion of paragraph 17 that characterizes certain communications of the defendants; paragraph 26 in that if offers a legal conclusion. The remainder the affidavit is considered together with other evidence in the summary judgment record.

SO ORDERED.

Janet L. Sanders
Justice of the Superior Court

Dated: September 13, 2016